

✓
Internal Revenue Service
memorandum

CC:TL:Br3

BMGately

date: JUN 22 1988
JHL

to: District Counsel, San Jose CC:SJ
Attn: DKChang

from: Chief, Branch No. 3, Tax Litigation Division CC:TL:Br3

subject: Request for technical advice- computation of § 6651(a)(1)
addition

This in response to your request for technical advice dated April 7, 1988, about the correct percentage to be applied for failure to timely file a return under § 6651(a)(1).

ISSUE

Under the circumstances described below, what is the proper percentage of addison under § 6651(a)(1)?

CONCLUSION

For the reasons set forth below, the percentage of the failure to file addition will be 5%, under the facts as you describe them. However, the amount of tax due, against which the 5% is to be applied, will vary depending on the date payment was made.

FACTS

Your request for technical advice proposes the following hypothetical situation. A decedent's estate tax return is due to be filed on or before March 1, 1987. The decedent's executor timely files for and is granted an extension until September 1, 1987 to file the estate tax return. The estate tax return is filed on September 20, 1987, 19 days after the return is due in accord with the extension. Subsequently, a deficiency in estate taxes and an addition pursuant to § 6651(a)(1) are proposed. Should the appropriate percentage of the addition to tax under § 6651(a)(1) be computed from March 1, 1987 (the return's due date determined without regard to the extension of time for filing) or from September 1, 1987 (the return's due date as extended)? You do not indicate when payment occurred.

008516

DISCUSSION

I.R.C. § 6651(a)(1) provides, in pertinent part, that in the case of failure to file any return "on the date prescribed therefor (determined with regard to any extension of time for filing)" five percent of the tax shown on the return shall be added to the tax, if the failure to file on time lasts no longer than one month. For each additional month, the percentage is increased in 5% increments, until it reaches a 25% maximum. The plain language of the statute suggests that, in the situation you describe, the liability for the addition attaches on September 1, 1987, the due date of the estate tax return, as extended. Therefore the correct percentage should be 5%.

Your submission, however, asks whether the holding of Rev. Rul. 81-237, 1981-2 C.B. 245, changes this result. We believe that Rev. Rul. 81-237 does not alter this result. Rev. Rul. 81-237 addresses a situation in which an extension is obtained for the filing of an estate tax return. Subsequently, the estate tax is paid after the original due date of the return, but before the due date as extended. The revenue ruling holds correctly that failure to pay on the original due date leads to the result that the failure to timely file addition is calculated as a percentage of the entire amount required to be shown on the return. The failure to pay on the original due date prevents the late payment from reducing the amount required to be shown on the return, pursuant to § 6651(b)(1).

The correct result in the situation you describe depends, therefore, on the date of payment. If the taxpayer pays the amount of estate tax due (or an amount in excess of that) on or before March 1, 1987, the original due date, the full amount of that payment will reduce the amount required to be shown on the return, in determining the "net amount due pursuant to § 6651(b)(1)." Even where the return is filed 19 days after the extension expires, there is no "net amount due" against which the 5% addition can be calculated if the tax was timely paid. The \$100 minimum provided for by the flush language of § 6651(a) would not apply, because estate taxes are not "chapter 1" taxes.

If, by contrast, the extension is granted but the estate taxes are not paid until some time after the original due date of March 1, 1987, has passed, Rev. Rul. 81-237 would apply. The amount paid could not reduce the amount required to be shown on the return because the time of payment is determined without regard to extensions under § 6651(b). Therefore the percentage would be applied against the entire amount of the tax liability. Since the failure to file addition of § 6651(a)(1) is determined with regard to extensions, in the case where the return is filed

after the due date as extended, the percentage is determined by reference to the extended date. Here the percentage would be 5% because the return was filed within one month of the due date, but the addition would be 5% of the entire amount required to be shown on the return.

Given that your submission asked a hypothetical question, we suggest that if other questions arise about a specific case or cases you should seek supplementary advice. Thank you for your inquiry.

Sincerely,

MARLENE GROSS
Director

By:


DANIEL J. WILES
Chief, Branch No. 3
Tax Litigation Division